Office - Supreme Court, U.S.
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NOV 27 1981
ALEXANDER L. STEVAS
CLERK

NO. 80-2043

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT, ET AL., PETITIONERS
V.
STEVEN A. PICO, BY HIS NEXT FRIEND FRANCES PICO, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

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CONSENT OF PARTIES

All parties have consented to the filing of this brief of Amicus Curiae. Initially, consent was received orally from George W. Lipp as counsel for Petitioner and from Arthur Eisenberg as attorney for Respondent, on November 20, 1981. Both such counsel agreed at that time to grant written consent, to be

mailed to this Amicus Curiae. Such written consents are being lodged with the Court herewith (or will be so lodged as soon as received).

INTEREST OF AMICUS CURIAE

The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm. Its goals, among others, include protection of economic freedom, removal of unreasonable regulation, attainment of a fair balance between the national government and the States, and preservation of a rational system of criminal justice. In conjunction with its interest in the federal-state balance, LFA has frequently undertaken to oppose undue federal intervention in local schools. LFA has also litigated to prevent the freedom of expression from

being burdened by unnecessary and unreasonable regulation.

LFA believes that the decision of the Court of Appeals in this case misses the point. The decision fails to give effect to first amendment interest of school board members, voters, citizens petitioning the school board for redress of grievances, parents, and school children generally. The Court of Appeals in fact violated the freedom of expression of many in order to grant privileges of illusory value to a few.

STATEMENT OF THE CASE

Frances Pico, next friend of the minor child Steven A. Pico, wished Steven to be able to read certain books that happened to contain graphic depiction of torture murder, anthropophagy, sex acts with animals, multiple four-letter descriptions of sexual and excretory acts,

and other material the suitability of which for minors some parents might doubt. This case presents no issue of Ms. Pico's right to allow Steven to read these materials, nor does it involve disability on her part to do so, since she could obtain them from any one of numerous libraries and bookstores. Instead, the case is an attempt to make such materials freely available in public schools to all schoolchildren, including those whose parents disagree with Ms. Pico. Specifically, it involves a suit filed by Frances Pico and other individuals to force the rest of the community in which she lives to continue to provide such books to all schoolchildren at taxpayers' expense in public school libraries.

A citizens' group named People of New York United ("PONYU") opposed this approach. Exercising the first amendment right of petition, PONYU advocated discontinuation of government sponsorship of the material at issue at taxpayer's expense in the school library. The members of the school board appointed a committee which studied each of the materials in question. Exercising independent judgment, the board determined that some of the materials in question should remain available at community expense to school children despite sensitive contents (though it caused at least one of the books to be placed on restricted shelving). This action had no effect upon the rights or practical abilities of willing adults to obtain the materials in question. It also had no effect on the

ability of adults to sell or lend such books to minors, or the ability of minors to borrow or purchase them from places other than school libraries. Indeed, it did not prevent teachers from using the books in discussion.

Nevertheless, this action led to Mrs. Pico's suit. The district court granted summary judgment for the school board. The Court of Appeals, however, reversed and remanded the case for trial. Three separate opinions make the basis of decision difficult to characterize, but it appears to be based upon the notion that the school board's motivation was improperly "political" since its attention was directed to the problem by a citizens' group and since it considered the content of the materials.

SUMMARY OF ARGUMENT

I.

The action of the Court of Appeals itself violates the first amendment. It forces members of the school board, and members of the community who can speak only through the school board, to sponsor materials as appropriate for schoolchildren when otherwise they would not do so. It results in a judicial preference for shock writing over other kinds of expression. It inhibits experimentation with new and controversial educational materials or curricula, since it means that such materials will be difficult to remove even if they fail to accomplish educational purposes. And it proceeds on the strange assumption that the "symbolic" disapproval implied by the board's action is unconstitutional, even though

this assumption involves prohibiting symbolic action by the board precisely because it is speech.

The Court of Appeals' opinion likewise violates the first amendment rights of citizens to petition their government for a redress of grievances, since it is based in part upon the initiation of consideration of the problem by a citizens' group. Finally, the Court of Appeals' view of the "indoctrinative" function of education violates the right of parents to determine the manner in which the moral compass of society will be transmitted to their children.

II.

The Board's action does not hinder anyone's exercise of free expression. The existence of a constitutional right does not mean that government must sponsor its exercise in any particular manner

at taxpayer's expense. Furthermore, the Court of Appeals' references to "banning" or "condemning" books simply have no relation to this case.

III.

The Court of Appeals' decision forces an unwilling district court to sit as a super school board, with detrimental effects upon both schools and courts.

ARGUMENT AND AUTHORITIES

I. THOUGH PURPORTING TO PROTECT THE FREEDOM OF EXPRESSION, THE DECISION OF THE COURT OF APPEALS IN FACT VIOLATES THAT FREEDOM.

A. The Decision Forces Endorsement of Expression Upon the School Board Members.

(1) Plaintiff's sole desire in this case is for a judicially forced symbolic act of approval from the school boards despite its members' unwillingness.

This case has arisen because Plaintiffs wish the members of the school,

as representatives of the community, to be judicially forced to make an implied statement of endorsement of the books in question as suitable reading material for minors. There can be no question that such an inference would result from inclusion of the books in a public school library. Indeed, so strong is the implication of approval that at least two federal courts have examined the contents of a school's library in determining its educational policy. Parducci v. Rutland, 316 F. Supp. 352, 358 (M.D. Ala. 1970) (teacher's forcing of students to read offensive material justified by reference to fact that "the school library contains a number of books with controversial words and philosophies"); Mailloux v. Kiley, 323 F. Supp. 1387 (D. Mass. 1970), aff'd 448 F.2d 1242 (1st Cir. 1971) (be-

cause particular four-letter word was in books in the school library, teacher could use it in the classroom).

Additionally, the decisions in this area are full of statements to the effect that school boards have the authority to select appropriate educational materials to transmit the values of the society. E.g., Zykan v. Warsaw Community School Corporation, 631 F.2d 1300, 1305 (7th Cir. 1980); Cary v. Board of Education, 598 F.2d 535, 543 (10th Cir. 1979). Given this charge, it is natural for parents and schoolchildren to assume that materials so selected do reflect these values, and to force the school board to endorse materials that insult these values infringes upon its members' own freedom of expression.

(2) The Court of Appeals' opinion forces subsidy of certain kinds of expression at the expense of others.

To shelve, store, catalog, and maintain a book in a library requires the expenditure of limited resources. Use of these funds to store one book necessarily prevents the library from spending funds on another purpose. It is entirely possible that, instead of spending money to maintain, trace, catalog and shelve works by Vonnegut or Cleaver, the school district might have chosen to do the same with books on defensive football tactics, medieval English history or knitting. The Court of Appeals' decision not only prevents this choice, but requires the school board, involuntarily, to fund retention of the books in question in perpetuity. The logical extension of this reasoning is to require the school board, in perpetuity, to continue periodical subscriptions, even at enormous

expense. Indeed, such a result was reached in Salvail v. The Nashua Board of Education, 469 F. Supp. 1269 (D.N.H. 1979) in which the court literally and expressly required the school board to undertake "replacement and resubscription [of the magazine, MS.] to be made, if necessary, by purchase out of the first funds available for library purposes" (emphasis added), even though the school board had concluded that the explicit advice concerning sexual intercourse techniques contained in the publication at issue rendered it educationally unsuitable, and even though the court's decision obviously prevented valid use of the funds for other expression. The Nashua Board of Education was then forced to continue to buy MS. Magazine indefinitely -- instead of The National Geographic, or The New Republic, or other kinds of

expression. The Court of Appeals' opinion in this case compels the same result.

(3) The Court of Appeals' opinion requires an anomalous preference of certain expression precisely because it is less educationally appropriate.

Logical extension of this reasoning leads to the conclusion that the school board is required to give an anomalous kind of judicially ordered preference to certain kinds of expression over others. Removal of innocuous material is permissible, but discontinuation of expression favoring sadism, promiscuity, racial prejudice, religious persecution, bestiality, and other distasteful material is illegal. Discontinuation of offensive material is likely to be done on the basis of its content, and it may even be done at the "political" initiation of irate parents or citizens' groups, a

process which the Court of Appeals would consider unlawful. If applied literally, the principle that educationally appropriate material can be lawfully removed, but that offensive and inappropriate material cannot be, would result in school libraries containing only books that disgust and shock. Such an approach is not only logically indefensible, but violative of the right of the school board and the community that speaks through its members to avoid expressing approval of material of which they in fact disapprove.

(4) The "wrong" of which the school board stands accused here is, ironically, that of symbolic expression protected under the first amendment.

Judge Newman, who cast the deciding vote below, decided the case not on the basis that there had been any restraint

or censorship of speech, but rather on the ground that the school board members had themselves engaged in protected freedom of expression of which Judge Newman disapproved. Specifically, Judge Newman's opinion reads as follows, in pertinent part:

> The symbolic effect of a school's action in removing a book solely because of its ideas will often be more significant than the resulting limitation upon access to it. The fact that the book borrowed from the school library may be available elsewhere is not decisive. What is significant is that the school has used its public power to perform an act clearly indicating that the views represented by the forbidden book are unacceptable. The impact of burning a book does not depend on whether every copy is on the fire. Removing a book from a school library is a less offensive act, but it can also pose a substantial threat of suppression.

638 F.2d at 434. Judge Newman's reasoning -- that it is not the availability of the book that is at issue, but rather the need to suppress the views of the school board's members -- could not be more clear. His comments could be equally applied to a school board member's public speech advising against the reading of Slaughterhouse Five or Soul on Ice. Likewise, under Judge Newman's view, the posting in the school library of a school newspaper excerpt containing a negative review of the book would be illegal. Prohibiting a school board's action because of its symbolic effect is as unconstitutional as prohibiting explicit utterances, because symbolic speech is protected under the Constitution. Tinker v. Des Moines Independent School Dist.,

393 U.S. 503 (1969).* Furthermore, the right extends even to school boards and to those in the community who can only speak through school boards.

B. The Court of Appeals' Decision Discourages Experimentation With Controversial New Curricula or Materials, Because Such Materials Cannot Easily be Removed Later Even if They Prove Educationally Inappropriate.

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* The Court of Appeals inappropriately cited Tinker in support of its result, and it may be expected that Plaintiffs may do the same in this Court. Tinker is inappropriate as authority because Plaintiffs here, unlike those in Tinker, do not seek to engage in symbolic expression. Instead, they seek to force others (the school board, its members, and the majority of the community) to engage in the symbolic act of subsidizing certain books and thus signify approval of Plaintiffs' views. For a discussion of the inappropriateness of Tinker's "disruption" reasoning in this context, see Goldstein, The Asserted Constitutional Right of Public School Teachers to Determine What They Teach, 124 U. Pa. L. Rev. 1293, 1322-23 (1976).

One of the most ironic results of the Court of Appeals' opinion will be its inhibition of anything but staid, orthodox views. The opinion makes experimentation extremely risky. The addition of a controversial textbook, subject matter, curriculum, or teaching method will insure the difficulty of its removal, because if it has any adherents at all, they will challenge its removal as "political" precisely because of its controversial nature. Indeed, any school board attorney worth his salt will so warn his clients.

Lest this line of reasoning be considered illogical, it should be pointed out that at least two federal courts have followed it. For example, in Right to Read Defense Committee v. School Committee, 454 F. Supp. 703, 712 (D. Mass. 1978),

the school board removed a book called Male & Female because of its conclusion that it was "filthy," "obscene," and "disgusting." The court acknowledged the right of a school committee to determine what books will go into a library. The court further pointed out that the committee was under no obligation to purchase Male & Female for the high school library. But, the court concluded, "it is a familiar constitutional principle that a state, through having acted though not compelled, may consequentially create a constitutionally protected interest." Thus, having experimented with a controversial matter, the school committee was "locked" into keeping it and had no discretion to change. Accord, Minarcini v. Strongsville City School District, 541 F.2d 577 (6th Cir. 1976) ("once having created such a

privilege for the benefit of its students, however, neither body could place conditions on the use of the library . . .").

Such reasoning unconstitutionally penalizes exercise of the right to experiment with new and controversial ideas and to undertake change if the experiment does not succeed.

C. The Court of Appeals' Decision Penalizes Citizens' Groups for Exercising the First Amendment Right to Petition Their School Board for a Redress of Grievances.

The opinion of the Court of Appeals turns in large measure upon the fact that consideration of the books at issue was initiated by a citizens' group. The court purportedly found of constitutional significance the fact that the handbills produced by this citizens' group were "crudely typed", and it quoted at length from the views of the citizens' group.

The court even found it necessary to critique the editorial style of the handbills, indicated that they left "no great sense of confidence in the literal accuracy of the quotations" contained in them, although the excerpts quoted by the dissenting judge show that, to the contrary, the handbills were accurate.

The petition of this citizen's group for a redress of grievances led to the appointing of a committee, which, in turn, led to board consideration of the books at issue. The opinion of the court, in a departure from the first amendment that could not be clearer, expressly disapproves such citizen input, labelling it perjoratively as "political." The court argues that the case does not involve "routine" actions of school officials alone. "What we have instead

is an unusual and irregular intervention in the school library's operations by persons not routinely concerned with such matters [i.e., by American citizens]." Further, in the strange view of the opinion of the court, citizen input, "far from clarifying the scope and intentions behind the official action, create[s] instead grave questions concerning both subjects." 638 F.2d at 414. This is extraordinary reasoning for a court in the United States to engage in. Stripped of its rhetoric, the Court's opinion amounts to nothing more nor less than disapproval of the input of American citizens into the process by which they are governed.

The first amendment goes beyond protecting the "freedom of speech." It also expresses specific protection for

the right of citizens to "petition" the government "for a redress of grievances." If that right means anything, it must mean that the decision of a public body is not invalid merely because it is the ultimate result of citizen initiation. The Court of Appeals' decision penalizes citizens for exercising this right.

The first amendment right of petition exists with reference to the content of school instruction and educational materials. Thus, in Williams v. Board of Education, 388 F. Supp. 93 (S.D. W.Va. 1975), aff'd, 530 F.2d 972 (4th Cir. 1975), plaintiffs were parents of school-children who sued to restrain a school board from allowing use of textbooks they considered offensive to their moral concepts and to their "personal . . . and familial privacy." The court denied relief and concluded,

> In the absence of basis for relief in the courts, where no violation of constitutional rights is found, plaintiffs and parties similarly situated, with references to books and materials found offensive to and objectionable by them, may find administrative remedies through board of education proceedings or ultimately at the polls on election day.

388 F. Supp. at 96. The right of petition recognized in that case should be available to the citizens' group in this case.

D. The Majority's Reasoning About the "Indoctrinative" Function of Education Violates the Rights of Parents to Decide How Moral Values Will be Taught to Their Children.

Virtually all of the cases dealing with book and curricular selection indicate that transmittal of moral values of the community is a major function of education, particularly at the elementary and secondary levels. The Court of Appeals recognized this principle, expressly stating:

> A principal function of all elementary and secondary education is indoctrinative--whether it be to teach the ABCs or multiplication tables or to transmit the basic values of the community.

638 F.2d at 412.

The court, however, did not in this case allow the school board to pursue rational policies for this "primary" function. Such policies must be exercised in the light of the content of the material and in light of community views and standards, but these are considerations the court considered impermissibly "political." The court's reasoning contrasts sharply with the reasoning of another Court that

> a teacher does not have a right, constitutional or otherwise to teach what he sees fit or to overrule the parents' decision as to which courses their children will take.

Mercer v. Michigan State Board of Education, 379 F. Supp. 580, 586 (E.D. Mich. 1974), aff'd, 419 U.S. 1081 (1974).

The content of material, even if it is not obscene or vulgar, may have educational significance in this function. Allegorical material, for example, while appropriate for communication to sophisticated students, may not be appropriate for children, because children tend to take it literally. See, e.g., J. Piaget, The Language and Thought of the Child (1924); J. Piaget, The Moral Judgment of the Child (1932); R. Brown, Social Psychology Ch. 8 (1965). Some of the material at issue in this case contains neutral descriptions of deplorable, even terrifying, behavior. It contains literal advocacy of the worst kind of prejudices and exploitative acts. Some of it is satirical, intended to disapprove the very conduct it seems to condone (e.g., Swift's Modest Proposal). For adults,

such material can be worthwhile because of its literary merit or even its view illustrating moral complexities. In a child, however, it may inspire imitative behavior. Children learn much of their moral judgment by assimilation and modeling of stories. R. Brown, supra, at 394-401. Parents residing in the Island Tree Union Free School District were entitled so to conclude, and they were further entitled, through their elected representatives, to express that conclusion.

Children in public schools, and their parents as well, constitute a captive audience. Plaintiffs in this case wish to use judicially coerced symbolic approval of the materials they consider educationally appropriate for moral purposes to inflict them upon this

captive audience. Plaintiffs could, if they wish, express their moral theories by provision of these materials from other sources to their children; their reason for not doing so is the desire to force the school board to do so as to children whose parents are unwilling. Such parents, unlike the plaintiffs, have no ability to express their views on the subject, other than through the action of the school board, since they cannot be with their children from moment to moment throughout the school day to supervise them. The solution chosen by plaintiffs to make the books in question available at taxpayer expense to all children, even over the objections of the majority of parents expressed through the school board, provides plaintiffs no additional rights and ignores the interests of

parents who disagree. See Goldstein, The Asserted Constitutional Right of Public School Teachers to Determine What They Teach, 124 U. Pa. L.Rev. 1293, 1340 (1976). The result is an invasion of the associational privacy of the family, a denial of parental right to influence the moral growth of children, and an infringement even of the right to speak through one's elected representatives.

II. THE SCHOOL BOARD'S ACTION DOES NOT HINDER ANYBODY'S FREEDOM OF EXPRESSION.

A. The Existence of a Constitutional Right Does Not Mean the Government Must Sponsor Its Exercise at Taxpayer's Expense.

What Plaintiffs in this case seek through their lawsuit is an order directing the government to financially sponsor their idiosyncratic desires with respect to curriculum and reading material. The

existence of a constitutional right has never meant that there is a concomitant constitutional compulsion for the government, at whatever level, to subsidize the exercise of that right. For example, this Court in Roe v. Wade, 410 U.S. 113 (1973), held that there is a constitutional right to obtain an abortion during the first trimester. Such a determination, however, did not translate into a governmental responsibility to finance the exercise of that right.

Even in those areas in which the protection of freedom of speech is of paramount concern, such as in campaigns for elective office or similar political speech, the existence of the constitutional right does not create a concomitant right to have that speech financed. Anyone has the right in the political

arena to support any candidate or to support any cause, but the government is not required to supply financial sponsorship for those activities. In fact, no logical or practical limitations could be applied if the government must financially sponsor the exercise of the right of free speech. Since the right extends to each individual, presumably the government would be required to adequately finance each individual to exercise fully his or her rights. See Goldstein, The Asserted Constitutional Right of Public School Teachers to Determine What They Teach, 124 U. Pa. L.Rev. 1293, 1340 (1976). If the Picos and their supporters are entitled to retain or place the books they desire in the school library, that right also accrues to all others in the school

community. This result would be irrational and catastrophic for the school district.

The Court of Appeals objected to the "political" nature of the determination by the school board. But the board's decision required quasi-legislative balancing of limited resources. The board, being the duly elected body designated by the taxpayers to manage the schools for which they contribute their tax dollars, is the only logical and viable group to be responsible for decisions of this kind. In fact, to carry the Plaintiffs' request to its logical conclusion would require some level of government to purchase or retain for each citizen any book he or she desires to read even though the funds are not available or the book, though purchased, cannot economically be maintained.

B. Discontinuation of Government Sponsorship of Materials that Are Inferior for Educational Purposes Does Not Amount to "Banning" or "Condemning" Expression, Nor Does It Violate the First Amendment.

The first amendment simply states that no law shall be made "abridging the freedom of speech, or of the press." The Court of Appeals' opinion does not offer an explanation of any way in which the school board abridged any speech. The court talks about the "burning" of books, although the reference is preposterous since the case does not remotely involve any such thing. It also talks about the "condemning" of books as educationally inappropriate. In essence, though the Court disclaims any such notion, its opinion means that any identification of materials that may not be appropriate for use by students is an abridgement of

speech. The logical conclusion one draws from its decision is that any time the board makes a decision concerning curriculum based upon the desires, input or moral values of the community, it has engaged in a "political" decision and has abridged the first amendment.

The fact that the school district determined that certain works would not be included in its curriculum or in the school library has in no way limited the availability of those works to the Plaintiffs. Plaintiffs are perfectly free to obtain and read those books from the local public library or from a local bookstore. The argument cannot be made that the books must be placed in the school library to make them available to the Plaintiffs. Frances Pico does not and cannot claim that she is unable to

get any one of these books, free, from any of a variety of sources. Indeed, Steven Pico, though a minor, can also do so. Plaintiffs do not seek any such right; instead, their desire is to inflict their views on others.

III. THE COURT OF APPEALS' DECISION FORCES AN UNWILLING DISTRICT COURT TO SIT AS A SUPER SCHOOL BOARD WITH DETRIMENTAL EFFECTS FOR BOTH SCHOOLS AND COURTS.

If the Plaintiffs are successful in this case, the result will be to place District Courts across the nation in the position of serving as super school boards, monitoring all curricular decisions to ensure the absence of any citizen input or "political" motive. The Court of Appeals disclaims any intent to limit the use of community standards and tastes

for the determination of curricular and other educational decisions. However, the Court also indicates that it will require school boards to follow an "objective" set of criteria for school library decisions. 638 F. 2d at 418, n.13. It is difficult to imagine how a school board can establish "objective" criteria to implement personal tastes and community standards, which are by their very nature subjective. It is even more difficult to imagine court review of decisions so made. It is precisely these decisions which should be left to the duly elected body, the school board.

In its advocacy of "objective" criteria, the court confused curricular decisions with disciplinary cases. It may be necessary to have objective criteria to fire a teacher or suspend a

student, because such decisions are made in reaction to individuals' conduct or speech. No such problem arises with the selection of a library book. The Court's confusion led it to an erroneous result. 638 F.2d at 418 n.13.

As the involvement of the courts, and that of lawyers, becomes more prevalent in the schools, board decisions are increasingly made by lawyers. When legal issues are inserted into school board matters, the board will be reluctant to disagree with the recommendation made by its lawyers. The result will be that what traditionally are and should be policy decisions will become legal decisions. Lawyers are not, however, educators and are simply not suited to make educational policy decisions.

Furthermore, the invocation of legal and other extraneous controls on the schools has the result of decreasing public support for those institutions. The traditional strength of schools in this country has been through the support of the local community. The Court of Appeals decision, however, places one more restraint on the ability of the local community to control its schools through the available political process.

Justice Powell expressed these ideas in Columbus Board of Education v. Penick, 443 U.S. 449 (1980) and in Dayton Board of Education v. Brinkman, 443 U.S. 526 (1980) (dissenting opinion), as follows:

> The orders affirmed today typify intrusions on local and professional authorities that affect adversely the quality of education. . . . This wholesale subsitution of judicial legislation for the judgments of elected officials and professional

> educators . . . constitutes a serious interference with the private decisions of parents as to how their children will be educated . . . .
>
> These harmful consequences, moreover, in all likelihood will provoke responses that will defeat the . . . purpose of the court's order. Parents, unlike school officials, are not bound by these decrees and may frustrate them through the simple expedient of withdrawing their children from a public school system in which they have lost confidence.
>
> . . . It would be unfair and misleading to attribute this phenomenon to a racist response to integration per se. It is at least as likely that the exodus is in substantial part a natural reaction to the displacement of professional and local control that occurs when courts go into the business of restructuring and operating schol systems. 99 S.Ct. at 2990.

Or, as the Court of Appeals has said in another case,

> Academic freedom is scarcely fostered by the intrusion of three or even nine federal jurists making curriculum or library choices for the community of scholars.

President's Council, Dist. 25 v. Community School Board, 457 F.2d 289, 292 (2d Cir. 1972), cert. denied, 409 U.S. 998 (1972).

Over the past two decades there has been an explosion of cases in which the federal judiciary has become involved in the operations of the public schools. Federal judges have decided issues regarding the length of students' hair and who can play football. Discipline of unruly students and termination of incompetent teachers have been made impractically difficult in many instances by judicial decisions, without even mentioning draconian desegregation remedies. While these decisions represent an unwarranted degree of intrusion on the local control of schools, the Court of Appeals' decision controls the very essence of a school board's mission: the determination of

educational policy. Such decisions should be made instead by the community whose children are being taught.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David Crump, hereby certify that I have served three copies hereof upon each counsel of record in this cause, by mailing same, first-class postage prepaid, to each such counsel at his post office address, namely, George W. Lipp and Arthur Eisenberg, on this _____ day of _____, 1981.

_____
David Crump